Central Intelligence Agency

Washington, D.C. 20505

OGC 79-01128

1 February 1979

Honorable Philip B. Heymann
Assistant Attorney General
Criminal Division
Department of Justice
Washington, D. C. 20530

Dear Phil:

I recently had occasion to read your memorandum to the Director of the FBI dated November 22, 1978, relating to the Graham Martin case and concluding that there was no basis for prosecution under either 18 U.S.C. §793(e) or (f). While I have no ax to grind with respect to Ambassador Martin, and can readily understand that his age and poor health may have influenced or even controlled the decision to decline prosecution, there are aspects of your memorandum that I found troubling enough to prompt this letter.

Leaving aside its treatment of the issue of gross negligence, what the memorandum essentially says is that a prosecution under Section 793(e) might have foundered on Ambassador Martin's claim that his possession of the documents was authorized, while prosecution under Section 793(f)(2) might have foundered on Ambassador Martin's claim that the documents were no longer classified. It is not clear to me whether you viewed these claims as interlocking, or whether it was your view that there might have been some validity in the claim of authorized possession even though it was shown that the documents remained classified.

The claim of authorized possession is hard to swallow. There is no reference in the memorandum to any statute, regulation or directive from which any authority might have arguably been derived. The only reference is to a statement by Dr. Kissinger to the effect that Ambassador Martin "had the general authorization that any ambassador has to take private papers." But that statement is factually and legally irrelevant. The documents retained and then lost by Ambassador Martin were not private papers. See The Reporters Committee for Freedom of the Press v. Vance, 442 F.Supp. 383 (D.D.C. 1977), affirmed, D. C. Cir. No. 78-1207 (decided November 7, 1978). They were official government records, some evidently being originals of which there were no duplicate copies and many surely having significant historical

value. All indications are that the removal of these materials was contrary to the basic legal rules governing the management and disposal of federal records, as prescribed by the Federal Records Act, 44 U.S.C. §3301, et seq., and that would be true wholly apart from national security considerations and any question of classification. The unlawful removal of federal records is of course itself the subject of a criminal statute, namely 18 U.S.C. §2071.

It is likewise hard to take seriously the claim that the documents involved had lost their classified character. I am informed that the handwritten notation "reduced to unclassified 6 May 1975" appeared on many of the documents, but I do not know when or by whom that notation was made. Certainly none of the CIA documents retained by Ambassador Martin had ever been declassified in any formal sense, and the contention that the passage of time had caused the information to become outdated, thereby causing the documents to become declassified, is the typical post hoc rationalization that is heard when national security materials are compromised. To the best of my knowledge, there is no analysis that supports this contention as to any of the documents, let alone as to all of the documents. Several agencies, including CIA, were engaged in a review of the documents when they were notified by your memorandum that no further action would be taken. Notwithstanding that notification CIA continued and completed its review. The judgments that emerged are that, among those documents that were originally classified by CIA or that contain CIA information, most still warranted classification at the time of their loss and recovery, and many still warrant classification today. Parenthetically, I am told that these conclusions are consistent with the terms of a deposit agreement dated February 2, 1978, signed by Ambassador Martin, purporting to convey the documents in question to the LBJ Presidential Library. Whether that is true or not, I trust that the deposit agreement will not be given effect as to any of the CIA documents involved, because they simply were never Ambassador Martin's to convey in the first place, and that the originals and any outstanding copies of these documents will be returned to CIA.

It may well be that your investigation developed other pertinent facts. However, on the basis of the facts as summarized in your memorandum, the outcome is difficult to explain to those who are responsible for administering effective and credible security programs. It is also difficult for those officials to explain the outcome to others on

whom they must seek to impress the need for strict security standards, or the consequences that may ensue from a failure to adhere to such standards.

Sincerely,

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Anthony A. Lapham
General Counsel

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